No. 12132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Brief Statement of the Case.

Appellant Walker was convicted by a jury of four counts of an indictment which originally consisted of eight counts. Count One had been dismissed. Walker was not charged as a defendant in Counts Two, Three and Four. Counts Five, Six, Seven and Eight, of which Walker was found guilty, were all substantially the same excepting as to the dates of the alleged sales of the narcotics, *i. e.,* September 16, 17, 20, and 22, all of 1948, and the amount of heroin charged to have been so sold on each of said dates.

The charges were brought under a provision of an Act frequently referred to as the "Harrison Narcotic Act," namely, that portion referring to "Unlawful acts in case of failure to register and pay special tax," more particularly, 26 U. S. C., Sec. 3224(a), "Trafficking."

It is believed that the record will reflect that no motion to dismiss or for a bill of particulars was made, and the first time the sufficiency of the indictment was questioned was when this appellant moved the trial court for admission to bail pending appeal, *i. e.,* subsequent to the verdict and sentence.

I.

The Indictment, and Particularly the Counts of Which the Appellant Was Found Guilty, States Offenses Against the Laws of the United States.

The argument advanced by appellant is that the indictment is fatally defective because it omits a specific charge "that appellant was required to register," or fails to include a clause somewhat as follows:—"being a person required by law to register." Appellant contends that a charge brought under this portion of the Act (26 U. S. C., Sec. 3224(a)) must so allege.

It is true that some indictments discussed by the appellate courts, brought under this portion of the Act, have utilized a phrase substantially as urged by appellant. It is, however difficult to see how such a phrase could have added to the instant indictment. The pertinent counts of the instant indictment, among other things, charge "without having registered with the Collector of Internal Revenue as a dealer in said narcotic * * *." And also charge "did sell" the specifically described narcotic without paying the special tax imposed by law on dealers. To go further would be to require a very technical overnicety.

(a) The Modern Practice of the Federal Courts, Especially Since the Adoption of the Federal Rules of Criminal Procedure, Is to Consider the Adequacy of Indictments on the Basis of Practical as Opposed to Technical Considerations.

The Federal Rules of Criminal Procedure, Rule 7(c), effective March 21, 1946, provide as follows:

> "(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

An inspection of the instant indictment, or any count thereof, will reveal that it meets the requirement of this Rule. The date is designated, the place of sale is designated, the defendant is named, and the person to whom he sold the narcotics is set forth. It then alleges that the defendant did not register with the Collector of Internal Revenue as a dealer and had not paid the special tax imposed by law on such dealers.

These allegations sufficiently earmark and identify the offense.

It is submitted that these allegations:

(a) Inform the defendant of the offense of which he is charged; and

(b) Are sufficiently certain to safeguard the accused from a second prosecution for the same act.

This Circuit, in the case of *U. S. v. Bickford,* 168 F. 2d 26 (C. C. A. 9), discussed an indictment with relation to the New Rules. In the *Bickford* case the District Court had held a perjury indictment to be insufficient because

it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaration of the sufficiency of the indictment, this Circuit stated as follows:

> "The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861; Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; Hopper v. United States, 9 Cir., 142 F. 2d 181. As observed in Hagner v. United States, *supra,* at page 433 of 285 U. S., at page 420 of 52 S. Ct., 'it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.' "

More recently this Circuit again sustained the sufficiency of an indictment with relation to the requirements of Rule 7(c), Federal Rules of Criminal Procedure. See:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9).

In the *Flynn* case an indictment for perjury merely alleged that the defendant, while testifying under oath, stated in open court certain material matter which he did not believe to be true, and then described the testimony of the accused. This was held to be sufficient under Rule 7(c), even though it did not contain the additional charge that the testimony given was in fact false. The court points out that the charges are stated in terms that protect the accused from the danger of being put in double jeopardy.

As an additional illustration of a recent ruling of the courts, we refer to a recent case decided by the Circuit, namely, *U. S. v. Ochoa,* 167 F. 2d 341 (C. C. A. 9). In that case, this court held that the omission in a murder charge of the phrase "with malice aforethought," as is provided in the statutory definition of murder (18 U. S. C., 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after Form No. 1 in the Appendix to the Federal Rules of Criminal Procedure.

This Circuit has again reaffirmed a liberal interpretation in construing an indictment in the case of:

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9).

In the *McCoy* case this court sustained a challenged count of an indictment charging the presentation of false claims and for aiding and abetting the so doing. This court held that every particular relating to such charge need not be set out in the indictment and also pointed out that the indictment must be considered as a whole:

Pp. 779-780—

> "Appellant's construction of the indictment is too narrow. In the first place every particular relating to the charge is not required to be set out in the indictment, and it is not required that every possible combination of facts, which would constitute legal acts, should be negatived in it. Hopper v. United States, 9 Cir., 142 F. 2d 181. * * * The indictment must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated."

The case of *Eisler v. U. S.,* 170 F. 2d 273 (C. A. D. C.), at pages 280-281, further illustrates the attitude of the courts in sustaining the sufficiency of an indictment, especially since the adoption of the Federal Rules of Criminal Procedure, *i. e.,* Rule 7(c).

It appears to be not only settled by statute but also by opinions, that in a charge brought under this particular phase of the Harrison Narcotic Act it is not necessary to negative the exemptions. To this effect—

26 U. S. C., 3224(c).

> "* * * *Provided further,* That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this part or subchapter A of chapter 23; and the burden of proof of any such exemption shall be upon the defendant. 53 Stat. 383."

It appears to be well settled that it is not necessary for an indictment brought under this statute to negative the exemptions. To this effect:

Haggerty v. U. S., 52 F. 2d 11 (C. C. A. 8);
Taylor v. U. S., 19 F. 2d 813 (C. C. A. 8);
Rothman v. U. S., 270 Fed. 31 (C. C. A. 2).

Certain of the exemptions provided for by the Harrison Narcotic Act are to be found in 26 U. S. C., Sec. 3220. The first paragraph of this section reads as follows:

26 U. S. C., 3220 Sup. "Tax."

> "On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, coca leaves, isonipecaine, or opiate, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30. As amended July 1, 1944, c. 377, §6, 58 Stat. 721; Mar. 8, 1946, c. 81, §6, 60 Stat. 39."

It should be noted that the above includes "every person" who "sells" or "deals in" opium and its derivatives.

The remainder of the aforesaid section then sets forth the tax required to be paid by "importers," "wholesale dealers," "retail dealers," "physicians," and others. Section 2551 of Title 26 provides for the exemption of preparations containing a limited narcotic content.

Section 3221 of Title 26 provides for the registration. Section 3227 of 26 U. S. C. provides for the applying of all provisions of law relating to special taxes imposed; and, finally, attention is invited to 26 U. S. C., Sec. 3228, under the heading "Definitions," wherein the broad definition of "persons" is set forth.

It should be noted that the section under which this charge was brought (26 U. S. C., Sec. 3223(a)) employs the phrase "any person."

The Harrison Narcotic Act is divided into many sections; it has also been amended and renumbered from time to time. It has several penal provisions. A penal provision of this Act that is more often used is 26 U. S. C., Sec. 2553. This provision pertains to selling, etc., of narcarotics "except in the original stamped package or from the original stamped package." Frequently charges are brought both under 3224(a) and 2553 of Title 26.

In the case of *Taylor v. U. S.,* 19 F. 2d 813 (C. C. A. 8), among other things the court pointed out that a "dealer" is one who sells narcotics promiscuously or is a person who is willing to sell to anyone applying to purchase. In the *Taylor* case it was pointed out that several sales constituted a person "a dealer." In the instant case four distinct sales were made. It is believed that these four sales should constitute appellant Walker as a "dealer," and the very allegation that he "did sell," additionally charges dealing in the illicit product. The *Taylor* case further points out that once the sale is established by the

Government the burden is on the defendant to prove that he had registered and paid the special tax, and that the Government is not required to prove a negative if the defendant has in his possession the evidence of the affirmative. See page 816, *Taylor v. U. S., supra.*

In the case of *Coleman v. U. S.,* 3 F. 2d 243 (C. C. A. 9), a charge brought under a somewhat similar phase of the Harrison Narcotic Act, this court held that the indictment was good although the same did not allege that the defendant (a physician) was a person required to register under Section 1 of the Act as it then read. We quote from the opinion, the following:

Page 244.

> "The indictment does not allege that Coleman was a physician, or that he was registered or practicing as a physician. But it is not necessary for the pleader to allege that the sale or barter between Coleman and Curtis was not in the course of the practice of Coleman as a physician. An indictment drawn under the provisions of section 2 need not negative the existence of any of the conditions contained in section 2. In other words, if Coleman's acts were proper, because done by him while he was lawfully practicing as a physician, it became incumbent upon him to interpose that defense. Weare v. United States (C. C. A.), 1 F. (2d) 617; Manning v. United States (C. C. A.), 275 F. 29; Hurwitz v. United States (C. C. A.), 299 F. 449. Furthermore, the concluding proviso of section 8 of the act referred to provides that it shall not be necessary to negative any of the aforesaid exemp-

tions in any indictment or proceeding laid or brought under the act. It refers, not merely to the exemptions specified in section 8, but also to those mentioned anywhere in the act. Such is the expressed ruling of the Circuit Court of Appeals in Nelson v. United States, 298 F. 93, and in Fyke v. United States, 254 F. 225, 165 C. C. A. 513. We hold that the indictment is sufficient."

In the case of *Nigro v. U. S.,* 276 U. S., Sec. 332 (decided April, 1928), a case brought under Section 2 of the Harrison Narcotic Act as it then read, the Supreme Court held that the phrase "any person" includes all persons and not merely those who were required by Section 1 to register and pay the tax; and, in reference to the *Coleman* case, *supra,* it stated as follows:

Pages 349, 351.

"The Circuit Court of Appeals of the Ninth Circuit, in Coleman v. United States, 3 F. (2d) 243, expressly found that the first provision of §2 was not intended to be limited in its application to the persons required to register under §1.

* * * * * * * * *

"We are of opinion, therefore, that the provision which is contained in the first sentence of §2 of the Act is not limited in its application to those persons who by §; are required to register and pay the tax. We answer the first question in the negative."

See, also—

U. S. v. Wong Sing, 260 U. S. 18.

Conclusion.

Appellee submits that the herein indictment is "a plain, concise and definite" statement of the essential facts constituting the offense charged, and is amply sufficient to protect the accused from a second prosecution for the same acts.

It is therefore submitted that the judgment should be affirmed.

Respectfully submitted,

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